№ 2006-1914

In the Supreme Court of Ohio

DOUGLAS GROCH, et al.,

Petitioners

v.

GENERAL MOTORS CORPORATION,

Respondents.

ON ORDER CERTIFYING QUESTIONS OF STATE LAW FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION
CASE № 3:06-CV-1604

MERIT BRIEF OF RESPONDENTS, KARD CORPORATION AND RACINE FEDERATED, INC., NATIONAL / KARD DIVISION

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STATEMENT OF FACTS

On June 2, 2006, Petitioners, Douglas and Chloe Groch ("petitioners"), commenced this action in the Lucas County Court of Common Pleas against Respondents, General Motors Corporation, Kard Corporation and Racine Federated, Inc., National/Kard Division. (Petitioners' Appx. 4). Petitioners alleged product liability claims against Respondents, Kard Corporation ("Kard") and Racine Federated, Inc., National/Kard Division ("Racine"), (collectively, "respondents"), as a result of injuries sustained by Douglas Groch ("Mr. Groch") while he was operating a trim process on March 3, 2005. (Id.) The trim press was manufactured by Kard Corporation and supplied to General Motors at its Toledo plant in November 1977.

On July 21, 2006, this case was removed to the United States District Court for the Northern District of Ohio, Western Division. Petitioners' initial Complaint, did not assert any allegations concerning the constitutionality of Ohio's statute of repose, R.C. 2305.10(C), enacted on April 7, 2005. However, petitioners amended their Complaint to allege the following with regard to Ohio's statute of repose, "[t]o the extent that the provision contained within R.C. 2305.10 as amended by S.B. 80, apply to this action the statute violated the Constitution of the State of Ohio." Petitioners also asserted that R.C. 4123.93 and 4123.931 are unconstitutional. The Ohio Attorney General was named as a party-defendant in the Amended Complaint.

On September 20, 2006, petitioners, respondents, and the Ohio Attorney General filed a joint motion asking the federal district court to certify questions to this Court, which it did on October 16, 2006 and November 27, 2006. (Petitioners' Appx. 1, 2.) These questions are now before this Court for its review and consideration. (Petitioners' Appx. 3.)

ARGUMENT OVERVIEW

The certified questions ask the parties to address the constitutionality of the statute of

repose enacted by the General Assembly in Am. Sub. S.B. 80 ("S.B. 80") and the Workers' Compensation subrogation statutes enacted in Am. Sub. S.B. 227 ("S.B. 227").

The statute of repose, R.C. 2305.10 (C) (1), provides that no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product. (Petitioners' Appx. 10.)

R.C. 4123.93 and R.C. 4123.931 are the Workers' Compensation subrogation statutes. (Petitioners' Appx. 14,15.) They provide that when a court awards damages or a claim is settled, the Bureau of Workers' Compensation ("BWC") or a self-insuring employer may apply its subrogation interest to that portion of the recovery representing losses that have been compensated by the workers' compensation system. Uncompensated losses, such as pain and suffering, property damage or loss of earnings above workers' compensation payments, are not subject to subrogation. Further, they provide a mechanism for protecting the injured worker should the future value of compensation be overestimated.

Petitioners maintain that R.C. 2305.10 (C) and the subrogation statutes violate provisions of the Ohio Constitution. When analyzing the constitutionality of a statute, the statute is presumed to be constitutional unless shown beyond a reasonable doubt to violate a constitutional provision. *Beagle v. Walden* (1997), 78 Ohio St. 3d 59, 61; *State v. Thompkins* (1996), 75 Ohio St. 3d 558, 560; *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St. 3d 351, 352. Thus, "before any legislative power, as expressed in a statute, can be held invalid, it must appear that such power is clearly denied by some constitutional provision." *Williams v. Scudder* (1921), 102 Ohio St. 305, 307. It is well accepted that "[t]he legislature is the primary judge of the needs

of public welfare, and this court will not nullify the decision of the legislature except in the case of a clear violation of a state or federal constitutional provision." *Beagle*, at 61.

The facial constitutional challenges to the statutes at issue are "the most difficult to bring successfully because a challenger must establish that there exists no set of circumstances under which the statute would be valid." *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶37. Petitioners face a high burden in challenging these statutes on a constitutional basis. An analysis of the statutes at issue, applying the proper presumption afforded to legislative enactments, establishes that R.C. 4123.93, R.C. 4123.931 and R.C. 2305.10 (C) must be upheld as constitutional.

a. The Statute of Repose

The statute of repose was enacted by S. B. 80. In enacting it, the General Assembly found that Ohio's current civil litigation system represents a challenge to the economy of the state, which is dependent on business providing essential jobs and creative innovation. See, Id. at Section 3 (A)(1). The General Assembly recognized that a fair system of civil justice strikes an essential balance between the rights of those who have been legitimately harmed and the rights of those who have been unfairly sued. Id. at Section 3 (A)(2). It found that this state has a rational and legitimate interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation. Id. at Section 3 (A)(3).

The General Assembly determined that statutes of repose are vital instruments that provide time limits, closure, and peace of mind to potential parties of lawsuits. Id. at Section 3 (A)(5)(a). Unlimited potential liability forces a manufacturer to maintain records in perpetuity

because it cannot predict when a record may become the subject of a civil action. Further, over the course of many years, purchasers or lessees of a product, or those responsible for its maintenance, could make modifications or other substantial changes that significantly change the intent or scope of the manufacturer's original design of the product.

In enacting R.C. 2305.10 (C), it was the intent of the General Assembly to recognize that subsequent to the delivery of a product, the manufacturer or supplier lacks control over (1) the product, (2) the uses made of the product, and (3) the conditions under which the product is used. Am. Sub. S.B. No. 80, Section 3 (C). The General Assembly determined that it is more appropriate for the party or parties who have had control over the product during the intervening time period to be responsible for any harm caused by the product. Id. at Section 3 (C)(4). When more than ten years has passed after a product has been delivered, it is very difficult for a manufacturer or supplier to locate reliable evidence and witnesses regarding the design, production, or marketing of the product. This is a severe disadvantage to manufacturers or suppliers in their efforts to defend actions based on a product liability claim. Id. at Section 3 (C) (5). Moreover, it is inappropriate to apply current legal and technological standards to products manufactured many years prior to the commencement of an action based on a product liability claim. Id. at Section 3 (C) (6). R.C. 2305.10 (C) enhances the competitiveness of Ohio manufacturers by reducing their exposure to disruptive and protracted liability with respect to products long out of their control, increases finality in commercial transactions, and allows manufacturers to conduct their affairs with increased certainty. Id. at Section 3 (C)(7).

The General Assembly has the power, duty, and resources to evaluate the fairness of Ohio's tort system and to enact laws for the improvement and continuing development of a fair, efficient, and consistent civil justice system. It is the only branch of state government fully

equipped to hold a full discussion of the competing principles and controversial issues relating to tort reform issues. See, *Schirmer v. Mt. Auburn Obstetrics and Gynecologic Association, Inc.*, 108 Ohio St.3d 494, 2006-Ohio-942, ¶ 84 (Lansinger, J. dissenting). "The policy or wisdom of a statute *** is the exclusive concern of the legislative branch of the government." *State ex rel. Visha v. Mt. Orab Village School Dist. Bd. of Ed.* (1942), 139 Ohio St. 427, 438. Considerations of public policy within our government of separated branched and powers, are a task uniquely suited for the General Assembly and ill suited for courts. See, *Weaver v. Edwin Shaw Hospital*, 104 Ohio St.3d 390, 2004-Ohio-6549, ¶ 31.

The General Assembly fulfilled its constitutional duties by codifying the substantive goals of tort law in S.B. 80. R.C. 2305.10 (C) strikes a rational balance between the rights of prospective claimants and the rights of product manufacturers and suppliers. The ten-year period of repose is a rational period of time, which precludes the problems of stale litigation, but does not affect civil actions against those in actual control and possession of a product at the time that the product causes an injury to real or personal property, bodily injury, or wrongful death. Id. at Am. Sub. S.B. 80, Section 3 (C) (8). Thus, R.C. 2305.10 (C) should be upheld.

b. The Workers' Compensation Subrogation Statutes

In enacting the current R.C. 4123.93 and R.C. 4123.931 in S.B. 227, the General Assembly cured the constitutional flaws found in the predecessor subrogation statutes which were addressed by this Court in *Holeton v Crouse Cartage Co.*, 92 Ohio State 3d 115, 2001-Ohio-109. R.C. 4123.931 provides a formula by which the types of damages awarded by judgement or settlement are calculated. Some part of the award is always free from subrogation, whereas under past statutes the entire amount was open to subrogation, even when no double recovery by the injured party occurred. Additionally, the amount of estimated future payments of

compensation may be put into an interest-bearing trust account to protect the claimant from overestimation of the future compensation. Thus, the creation of such an account protects a claimant from having to disgorge funds which he may never receive. Importantly, the current subrogation statutes treat claimants who try their cases in the same manner as claimants who settle their claims. Thus, the subrogation statutes adequately address the concerns of this Court in the *Holeton* decision.

CERTIFIED QUESTIONS FOR THIS COURT'S REVIEW

1. Respondents' Rebuttal to Petitioners' Proposition of Law No. 1: the Statute of Repose Codified in R.C. 2305.10 (C) Does Not Violate the Open Courts Provision of Section 16, Article I of the Ohio Constitution.

There is nothing in the text and history of Ohio's Open Courts provision to bar the General Assembly's constitutional prerogative to pass legislation creating a statute of repose for product liability claims. Petitioners' main argument relies on legal rhetoric rather than a principled analysis of the Open Courts provision. Petitioners assail the constitutionality of R.C. 2305.10 without even acknowledging the constitutional framework in which the issue must be presented. All statutes enacted by the General Assembly "enjoy a strong presumption of constitutionality." *State v. Cook*, 83 Ohio St. 3d 404, 409, 1998-Ohio-291. As stated in *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of syllabus, "[a]n enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." The General Assembly's enactments are "entitled to the benefit of every presumption in favor of its constitutionality." Id. at 147.

Legal rhetoric about "reopen[ing] the courthouse doors" [2] cannot substitute for the

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[2] *Brennaman v. R.M.I. Company*, 70 Ohio St. 3d 460, 468, 1994-Ohio-322.

required constitutional analysis. A presumption of constitutionality imposes a stringent level of constitutional analysis before a legislative enactment is declared unconstitutional. The presumption should not be treated as a mere speed bump on the road to declaring an enactment void. Every benefit of every doubt of constitutional justification must be accepted in each Justice's contemplation of the provision. This Court "must apply all presumptions in pertinent rules of construction so as to uphold it, if at all possible." *State v. Dorsa*, (1983) 40 Ohio St. 3d 60, 61. "It is not our duty to assess the wisdom of a statute, but to determine whether it was enacted pursuant to the General Assembly's constitutional authority." *Brennaman v. R.M.I. Company*, 70 Ohio St. 3d 460, 468, 1994-Ohio-322, citing, *Primes v. Tyler*, (1975) 43 Ohio St. 2d 195. Consequently, Petitioners' burden must demonstrate every assertion of unconstitutionality beyond a reasonable doubt. See, *Dickman* at paragraph one of syllabus.

a. R.C. Section 2305.10 (C) is not a Statute of Limitation but Functions as a Substantive Limitation on What is Considered an Actionable Product Liability Claim.

Petitioners state that R.C. 2305.10 (C) is "[e]xpressly intended to foreclose access to the courts and *to bar prosecution of claims* for relief where the injury occurs after an arbitrarily selected date." (Emphasis added). Petitioners' Merit Brief at p. 6. This argument misconstrues the legal effect of the General Assembly's enactment because R.C. 2305.10 (C) is not a statute of limitation that is pled in an answer to a complaint as a bar to the prosecution of a claim. R.C. 2305.10 (C) functions differently from a statute of limitations, as its language makes clear, "No cause of action based on a product liability claim *shall accrue* against the manufacturer or supplier of the product later than ten years from the date the product was delivered to its first purchaser ***." (Emphasis added). There no longer is a product liability cause of action with respect to products which have been in the marketplace over ten years after delivery to the first

purchaser. Such injury claims are no longer recognized as accruing and an injury caused by such a product is no longer actionable. It differs from a statute of limitation where a cause of action exists, but is subject to a procedural bar.

Petitioners' Open Courts constitutional challenge asserts one of the broadest statements of constitutional right that could be conceived in our tort system, "that under the Ohio Constitution the legislature may not deny remedy to one who has suffered bodily injury." Petitioners' Merit Brief at 9. According to petitioners, every injured person must always have a legally enforceable right to bring an action in court for injuries derived from the use of a product falling within Ohio's product liability statute - - and no law can operate as a check or limitation on that right. This assertion is untrue. Causes of action are often dismissed without remedy on the grounds that the claim was filed after expiration of a statute of limitations period. The General Assembly has established innumerable rules limiting or barring a recovery without violating the Constitution.

Section 16, Article I, of the Ohio Constitution is silent upon the distinction between statutes of limitation and statutes of repose where the latter acts as a legislative limitation on the definition of what constitutes "an injury done him"for which there is no "remedy by due course of law." A statute of limitations bars a claim after a person has been injured, but after the person has failed to pursue his remedy within the period of time provided. A statute of repose establishes when the law does not recognize the person as having been injured at all. It operates in the same way that the law often fails to recognize that a person has been injured in a compensable manner. See, e.g., R.C. 2305.116, establishing that Ohio does not recognize a claim for "wrongful birth."

Statutes of limitation and of repose are both constitutional under Section 16, Article I.

Nothing in the language or history of Section 16, Article I suggests that a statute of limitations may be constitutionally interposed as a defense to a remedy at law, but that a statute of repose that prevents a cause of action from accruing in the first instance is unconstitutional. In the former case, the General Assembly's determination that a remedy may be denied when a statute of limitations has elapsed is constitutionally permissible because the assertion of stale claims too long after the accrual of the claim creates problems of lost evidence and fading memories of witnesses, which reasonably accompany the passage of time after an inflicted injury. There is no reason to conclude that it is constitutionally impermissible for the General Assembly to address these same public policy concerns by adopting a products liability statute of repose. There is no legitimate constitutional distinction between the two scenarios that emanates from the language of the Open Courts provision. In both instances, a determination is made by due course of law that an injury to a citizen either does not accrue at all or, if accrued, is not remediable.

b. As a Statute of Repose, R.C. 2305.10 (C) Can Be Construed Consistently with the Language and Meaning of Section 16, Article I of the Ohio Constitution.

The Open Courts provision contains two distinct guarantees. The first is that legislative enactments may abridge individual rights only by "due course of law," a guarantee that is the equivalent to that of the due process clause of the Fourteenth Amendment. See, *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 544. Second, that "[a]ll courts shall be open to every person with a right to a remedy for injury to his person, property or reputation, with the opportunity for such remedy being granted at a meaningful time and in a meaningful manner." *Sedar v. Knowlton Construction Company* (1990), 49 Ohio St. 3d 193, 199.

Section 16, Article I, Constitution provides: "All courts shall be open, and every person, for an injury done him in his *** person ***, shall have a remedy by due course of law." The language "for an injury done him" and "by due course of law" should be read based on the

express terms of R.C. 2305.10 (C) and how it operates. The legal effect of the language of R.C. 2305.10 (C) is that after a ten year period has elapsed from the date of delivery of the product to its first purchaser, "no cause of action shall accrue." Under Section 16, Article I, there is, by due course of law, no compensable injury done him in his person by such a product. This distinction is that the function of R.C. 2305.10 (C) is to define substantive rights than to alter or modify a remedy. See, *Rosenberg v. North Bergen* (1972), 61 N.J. 190, 199, 293 A.2d 662.

c. Petitioners Rely Upon Inapplicable, Distinguishable Case Precedent.

Petitioners' Open Courts challenge to R.C. 2305.10 (C) principally relies upon *Brennaman* and three decisions from this Court in the medical malpractice field, *Mominee v. Scherbarth*, (1986), 28 Ohio St. 3d 270; *Hardy v. Vermeule* (1987), 32 Ohio St. 3d 45; and *Gaines v. Pre- Term-Cleveland, Inc.* (1987), 33 Ohio St. 3d 54. Similar to the majority's reasoning in *Brenneman*, petitioners' arguments ignore the crucial distinction between a true statute of repose [3] and a statute of limitation. The medical malpractice cases are easily distinguished and provide no support to petitioners' constitutional challenge.

First, in the medical malpractice cases, the statute of limitations terms were tethered to an already existing, accrued cause of action of a claimant. In those cases, the plaintiffs had, in fact, suffered an injury *at the time of the medical professional's breach of care*, but had no way of discovering the fact or extent of the injury until *after* the four year limitation period in R.C.

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[3]In *Mominee*, the statute in question, R.C. 2305.11(B), was not a true statute of repose. It provided generally that a cause of action for medical malpractice "shall be brought within one year after the cause of action accrued," but "in no event *** be brought more than four years after the act or omission constituting the alleged malpractice occurred." Unlike the language and operation of R.C. 2305.10 (C), the language of R.C. 2305.11(B) did not on its face attempt to define when or whether cause of action ever accrued to an injured person. The four year limitation period in R.C. 2305. 11(B) began to run from the date of the "act or omission constituting the alleged basis of the claim."

2305.11(B) had expired. As explained in *Sedar*:

> Operation of the medical malpractice repose statute takes away *an existing, actionable negligence claim before the injured party discovers it.* Thus, it "denies legal remedy to one who suffered bodily injury, * * *" in violation of the right-to-a-remedy guaranty. *Hardy*, supra [32 Ohio St. 3d] at 48, 512 N. E. 2d at 629.

(Emphasis added.) Id. at 201.

By contrast, in a product liability case, the crux of an actionable claim - - the sale and delivery in commerce of a defectively designed or manufactured product - - may be separated by years, indeed decades, *before* any consumer suffers any injury during use of the product. Given the fact of wear and tear on a product during normal usage, that all products have a normal useful life expectancy and that end purchasers often materially alter or modify the product to uses beyond its design and manufacturing intention, the General Assembly could well conclude that after a delay of ten years, no cause of action should accrue for such a product. Such a product is not one that in contemplation of law should be considered "defective." As stated in *Sedar*:

> In contrast, R.C. 2305.131 does not take away an existing cause of action, as applied in this case. " * * [I]ts effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten years after the negligent acts allegedly responsible for the harm, forms no basis for recovering. The injured party literally has no cause of action. * * *"

Id. at 201, citing, *Rosenberg*, 61 N.J.190 at 199. [4]

R.C. 2305.10(C) defines substantive rights rather than limiting an already accrued, vested cause of action. The General Assembly has drawn a temporal line of ten years after a product has been delivered for recognizing what is, and what is not, a substantive right based on its

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[4] The Court in *Rosenberg* reasoned that "[the statute] does not bar a cause of action [based upon a vested right] *** . The harm has been done is *damnum absque injuries*–a wrong for which the law affords no redress. The function of the statute is thus rather to define substantive rights than to alter or modify a remedy. The legislature is entirely at liberty to create new rights or to abolish old ones as long as no vested right is disturbed.

legislative determinations "[t]hat subsequent to the delivery of the product, the manufacturer or supplier lacks control over the product, over the uses made of the product, and over the conditions under which the product is used" and that "under those circumstances, it is "more appropriate for the party or parties who have had control over the product during the intervening period to be responsible for any harm caused by the product." Am. Sub. S.B. 80, Section (C) (3) and (4). *Cf., Sedar,* 49 Ohio St. 3d at 197 (recognizing that the ten year repose period for improvements to real property began to run upon the completion of performance of the construction related services, and that the "triggering event" was "consonant with the common-law rule shifting liability toward third parties to the owner of the building upon acceptance of the design construction of such a building.") Thus, under Section 16, Article I of the Ohio Constitution, R.C. 2305.10 (C) is clearly capable of being given an interpretation and application consistent with upholding constitutionality of the enactment - - a consistency that honors the required judicial presumption of constitutionality. When a cause of action no longer exists against the manufacturer with respect to the product later than ten years from the date product was delivered, under the language of the Open Courts provision, the person does not have an injury "done him *** by due course of law."

The "right-to-a-remedy" provision in Section 16, Article I, is traceable to the common law precept that there is no wrong without a remedy.[5] The converse is true as well, there is no remedy without a wrong. Here, the General Assembly in enacting R.C. 2305.10(C) has determined that a bodily injury to a user of a product where the product is more than ten years post sale and delivery, is not a wrong.

If the Open Courts provision were read to prohibit the General Assembly from classifying

[5]*Sedar,* 49 Ohio St. 3d at 201.

when and under what circumstances a claimant may have an actionable product liability cause of action, it would mean that the legislature may not determine what injuries are recognized and what remedies are available under Ohio law. This is not the law in Ohio:

> No one has a vested right in rules of the common law. The rights of property vested under the common law cannot be taken away without due process, but the law itself as a rule of conduct maybe changed at the will to legislature unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt to new circumstances.

Fassig v. State, Ex Rel Turner (1917), 95 Ohio St. 232, 248; *Thompson v. Ford* (1955), 164 Ohio St. 74, 79. By like reasoning, in *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy* (C.A. 6, 1984), 740 F. 2d 1362, 1370 [6] the court stated:

> The Ohio courts have never held that the "Open Court" provision in its Constitution prevents the legislature from abolishing a cause of action. In *Lafferty v. Shinn*, 38 Ohio St. 46, 48 (1882), the Ohio Supreme Court stated, that, under the provision, "it is not within the power of the legislature to abridge the period within which an existing right may be so asserted as that there shall not remain a reasonable time within which an action may be commenced." *This reasoning, however, applies only to "existing" rights; state law determines when the rights exist.* Section 16 guarantees a "remedy by due course of law" for "an injury done" but state law determines what injuries are recognized and what remedies are available. (Emphasis added)

Hence, the trio of medical malpractice cases cited by petitioners do not stand as a bar to

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[6] As other state courts construing similar Open Court provisions have noted, "[s]ocietal conditions occasionally require the law to change in a way that denies a plaintiff a cause of action available in an earlier day. * * * This Court would encroach upon the legislature's ability to guide the development of law if we invalidated legislation simply because the rule enacted by the legislature rejects some cause of action currently preferred by the courts. To do so would be to place certain rules of the "common law" and certain non-constitutional decisions of courts above all change except by constitutional amendment. Such result would offend our notion of the checks and balances between the various branches of government, and the flexibility required for the healthy growth of the law." *Klein v. Catalano* (1982), 386 Mass. 701, 712-13, 437 N.E.2d 514, 522, quoting *Freezer Storage, Inc. v. Armstrong Cork Company* (1978), 476 Pa. 270, 280-281, 382 A. 2d 715, 721.

the constitutionality of R.C. 2305.10 (C) under the Open Courts provision. The language of R.C. 2305.10 (C) differs from the language of former R.C. 2305.11(B) and the facts relating to already injured medical malpractice plaintiff where the cause of action had already accrued and vested do not apply here.

Nor does *Brennaman* support petitioners' Open Courts challenge. There, the ten year period at issue in R.C. 2305.131 provided that no action to recover damages for an injury arising out of an unsafe condition of an improvement to real property could be brought more than ten years after the furnishing of design services or construction of the improvement. The four Justice majority in *Brennaman* tossed aside the ten year repose period under R.C. 2305.131 in a truncated three paragraph effort of constitutional reasoning completely at odds with long established rules governing the presumption of constitutionality for the General Assembly's legislative efforts. Petitioners' brief relies on *Brenneman* for its rhetoric about "reopen[ing] the courthouse doors." But that facile phrasing is no substitute for judicial restraint founded upon the principle that statutory enactments enjoy a strong presumption of constitutionality - - indeed a presumption that requires a determination that the constitutional infirmity is beyond a reasonable doubt. Petitioners' need to rely upon *Brennaman's* simplistic construction of the Open Court provision's language proves too much. While *Brennaman* did hold R.C. 2305.131 unconstitutional because it "precluded the plaintiffs from filing suit on account of the injuries," 70 Ohio St. 3d at 466, such reasoning could be applied to every statutory limitations period. Thus, this simple statement is not enough to overcome the strong presumption of constitutionality afforded R.C. 2305.10(C).

Thus, the reasoning in *Brennaman* does not address the General Assembly's constitutional authority to determine what injuries are recognized as falling within the Open

Courts provision and decide what remedies are available "by due course of law." No decision of this Court has ever said otherwise.[7]

d. To the Extent this Court Finds *Brenneman* and *Sedar* in Irreconcilable Conflict, *Brenneman* Should Be Overruled Consistent with the Required Presumptions of Constitutionality and the Holdings of a Clear Majority of Sister State Courts.

In upholding the ten year limitation period in *Sedar*, the majority recognized all of the legal distinctions between a statute of repose and a statute of limitation. *Sedar* gave real judicial attention to the principle that "[a]ll legislative enactments enjoy a presumption of constitutionality," and that "courts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible" the statute under consideration. Id. at 199. Judicial deference was given even where legislative history was unavailable, by concluding that it was apparent that R.C. 2305.131 was neither unreasonable, nor arbitrary in setting the repose period, and was enacted "in response to the general demise of the privity requirement and the extension of liability of an architect or builder to third parties *** with whom the architects or builders have no contractual relationship." Id. at 199. Noting that a statute of repose "prevent[s] what might otherwise be a cause of action, from ever arising," the Court recognized that it "has never taken the position 'that causes of action as they existed at common law or the rules that govern such causes are immune from legislative attention.'" Id. Thus, "[t]he right-to-a-remedy

[7]Although petitioners assert that this Court's decision in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 477, 1999-Ohio-123 held that "the *concept* of a statute of repose violated the remedy by due course of law and open courts provisions of Section 16, Article I," *Sheward* said no such thing. The holding of *Sheward*, was simply "that Am.Sub. S.B. No. 350 is unconstitutional in toto." *Sheward* does not have precedential application here. See, Section 5 of this Brief, supra. To the extent that the decision in *Sheward* is to be considered as presenting substantive law applicable to any of the constitutional issues raised in this action, it should be overruled.

provision of Section 16, Article I applies only to existing, vested rights, and it is state law which determines what injuries are recognized and what remedies are available." Id. at 202. The reasoning in *Sedar* is well founded and consistent with substantial Ohio precedent.

Many states have adopted products liability statutes of repose which have been upheld as constitutional by courts of last resort.[8] Thus, *Sedar*'s position relating to statutes of repose is supported by the vast majority of decisions rendered by other state supreme courts.[9] Petitioners' Brief cites no cases from other states supporting the argument that statutes of repose in product liability cases violate sister state Open Court provisions - - many of which have identical state

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[8]The following states have statutes of repose relative to products liability claims. See, Ark. Code Ann. 16-116-105 (c); Colo. Rev. Stat. Ann. 13-80-107(1)(b); Conn. Gen. Stat. 52-577; Fla. Stat. Ann. 95.031(b); Ga. Code Ann. 51-1-11(b)(2), upheld as constitutional by the Georgia Supreme Court in *Love v. Whirlpool Corp.* (1994), 264 Ga. 701; 449 S.E.2d 602.; Idaho Code 6-1403(2), upheld as constitutional by the Idaho Supreme Court in *Olsen v. Freeman* (1990), 117 Idaho 706, 791 P.2d 1285; 735 Ill. Com. Stat. Ann. 5/13-213(b) (for strict liability claims); Ind. Code Ann. 34-20-3-1(b) upheld as constitutional by the Indiana Supreme Court in *McIntosh v. Melroe Co.* (2000), 729 N.E.2d 972; Iowa Code Ann. 614.1(2A); Kan. Stat. Ann. 60-3303; Ky. Rev. Stat. Ann. 411.310(1); Mich. Comp. Laws Ann., Chapter 58, Section 600.5805; Minn. Stat. 604.03; Neb. Rev. Stat. Ann. 25-224 (2), upheld as constitutional by the Nebraska Supreme Court in *Gillam v. Firestone Tire & Rubber Co.* (1992), 241 Neb. 414, 489 . N.W.2d 289; N.C. Gen. Stat. 1-50(a)(6), upheld as constitutional by the North Carolina Supreme Court in *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 332 S.E.2d 67; Or. Rev. Stat. 30.905(1); Tenn. Code Ann. 29-28-103(a); Tex. Civ. Prac. & Rem. Code Ann. 16.012(b); Wash. Rev. Code Ann. 7.72.060(1).

[9]Forty-seven other states have adopted statutes of repose in construction contexts. Am. Sub. S. B. No. 80, Section 3 (A)(5)(b). The following courts of last resort have upheld their state's statutes of repose (applicable to construction cases) against due process challenges. *Carter v. Hartenstein* (Ark. 1970), 455 S.W. 2d 918, appeal dismissed (1971), 401 U.S. 901; *Barnhouse v. Pinole* (1982), 133 Cal. App. 3d 171, 183 Cal. Rptr. 881; *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.* (Del. 1984), 489 A. 2d 413; *Beecher v. White* (Ind. App. 1983), 447 N.E. 2d 622; *Burmaster v. Gravity Drainage Dist. No. 2* (La. 1978), 366 So. 2d 1381; *Klein v. Catalano* (1982), 386 Mass. 701, 437 N.E. 2d 514; *O'Brien v. Hazelet & Erdal* (1980), 410 Mich. 1, 299 N.W. 2d 336; *Calder v. Crystal* (Minn. 1982), 318 N.W. 2d 838; *Reeves v. Ille Elec. Co.* (Mont. 1976), 551 P. 2d 647; *Williams v. Kingery Constr. Co.* (1987), 225 Neb. 235, 404 N.W. 2d 33; *Rosenberg v. North Bergen* (1972), 61 N.J. 190, 293 A. 2d 662; *Suburban Homes v. Austin-Northwest Dev. Co.* (Tex. App. 1987), 734 S.W. 2d 89. See also, the thirty-five state supreme court opinions identified in Appendix A of the Amicus Curiae Brief of National Federation of Independent Business Legal Foundation, et. al.

constitutional provisions. The reason is obvious, as most other state courts have upheld statutes of repose.

Despite its well-reasoned analysis, *Brenneman* overruled *Sedar* virtually without legal analysis (and, certainly, without deference to the doctrine of stare decisis), based on mere legal rhetoric about the need to "reopen the courthouse doors." 70 Ohio St. 3d at 466.

In the event this Court determines that *Sedar* and *Brenneman* are irreconcilable, *Brenneman* should be overruled. This Court is not bound by *Brennaman* simply because it was the last decision made. The *Brennaman* court did not abide by the doctrine of stare decisis in rendering its decision. Further, *Sedar* provided a well-reasoned discussion of why a statute of repose does *not* violate the "open courts" guarantee of Section 16, Article I.

The United States Supreme Court has determined that the doctrine of *stare decisis* is less compelling in cases of constitutional interpretation. See, *Dickerson v. United States* (2000), 530 U.S. 428, 443, 120 S. Ct. 2326, 2336, 147 L. Ed. 2d 405, 419. A prior decision of this Court "may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it." *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at¶ 48. "The Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations. If overruling a precedent would cause chaos, it should be upheld even if wrongly decided." *Id.* at ¶ 58 (internal citation and quotation marks omitted).

Brennaman has not become so embedded, so accepted, so fundamental, to everyone's

expectations that to change it would produce practical real-world dislocations. *Brennaman* contrasts prior Ohio Supreme Court precedent, legislative efforts and laws of other states. The Ohio General Assembly expressly requested that this Court reconsider its holding in *Brennaman*. Am. Sub. S. B. No. 80, Section 3 (E). This case presents this Court with the opportunity to do so. The time has come to revisit *Brennaman*'s broad prohibition of statutes of repose. Ohio should join with the majority of its sister states and uphold R.C. 2305.10 (C).

2. Respondents' Rebuttal to Petitioners' Propositions of Law Nos. 2 and 4: the Statute of Repose Codified in R.C. 2305.10 Does Not Deny Injured Ohioans Due Process of Law as Required by Section 16, Article I of the Ohio Constitution, Nor Does it Violate the Equal Protection Clause of Section 2, Article I of the Ohio Constitution.

The statute of repose codified in R.C. 2305.10 (C) does not violate either the due process or equal protection guarantees of the Ohio Constitution, and therefore it should be upheld as constitutional. Petitioners erroneously argue that determining whether the statute of repose infringes on an individual's due process rights or violates the equal protection clause requires a strict scrutiny analysis. This argument is without merit.

a. Petitioners' Due Process Challenge Fails.

This Court has consistently held that "a legislative enactment will be deemed valid on due process grounds '* * if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.'" *Mominee,* 28 Ohio St. 3d at 274, citing, *Benjamin* v. Columbus (1957), 167 Ohio St. 103, paragraph five of the syllabus; *Downing* v. *Cook* (1982), 69 Ohio St. 2d 149; and *DeMoise v. Dowell* (1984), 10 Ohio St. 3d 92. Petitioners' argument that R.C. 2305.10(C) violates the due process clause of Article 16, Section 1 of the Ohio Constitution is premised on petitioners' overarching belief that no legislation can ever deny an injured party the opportunity to be heard on a claim. See, Petitioners' Merit Brief at p. 10. However, R.C. 2305.10(C) is related to the general welfare of

the public. It serves as a tool which furthers the public policy goal of creating a fair and balanced system of civil justice in Ohio. It is not arbitrary because it bears a reasonable relationship to Ohio's need to provide time limits, closure and peace of mind to parties of lawsuits. Thus, as explained more fully below, petitioners' due process challenge fails.

b. Petitioners' Equal Protection Challenge Is Meritless.

In reviewing a constitutional challenge to a statute based on the right to equal protection, this Court must first examine the purported class distinction to decide if a suspect class or fundamental right is involved. *Adamsky v. Buckeye Local School Dist.*, 73 Ohio St. 3d 360,1995-Ohio-298. In the absence of a suspect class or fundamental right, legislative distinctions are valid if there is any rational basis for the unequal treatment of different groups. *Fabrey*, 70 Ohio St. 3d at 353.

Petitioners argue that the fact that their product liability claims may be barred by R.C. 2305.10(C) requires a strict scrutiny analysis of the statute of repose. However, a rational basis analysis should be applied. See, *Schwan v. Riverside Methodist Hosp.* (1983), 60 Ohio St.3d 300. In *Schwan*, the appellant raised a constitutional challenge based on equal protection. The statute at issue in *Schwan* also barred a potential litigant's claim, yet this Court applied a rational basis analysis. See, Id. at 301. Although the holding of *Schwan* is inapplicable to this Court's analysis, the level of constitutional scrutiny applied by this Court in that matter is applicable.

Petitioners' equal protection argument is based on the fact that the statute of repose distinguishes between individuals injured by a product that left a manufacturer's control over ten years prior to the injury, from individuals who are injured by a product that left the manufacturer less than ten years ago. Section 2, Article I of the Ohio Constitution provides, "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit."

As stated in *Beatty v. Akron City Hosp.* (1981), 67 Ohio St.2d 483, 491: "It is a fundamental principle that the equal protection guarantees of neither the Fourteenth Amendment to the United States Constitution, nor Section 2, Article I of the Ohio Constitution prohibit all legislative classification in that it may be readily perceived that there is, to some degree, a classification in most enactments of legislative bodies, both federal and state." The equal protection clause does not totally prevent legislative classification. It simply requires the existence of a reasonable ground for making a distinction between those within and those outside a designated class. Id., citing, *Kinney* v. *Kaiser Aluminum & Chemical Corp.* (1975), 41 Ohio St. 2d 120, 123 (citations omitted.)

Under this test, statutory distinctions which treat similarly situated individuals in a different manner are constitutionally permissible in the context of equal protection if any rational, nonarbitrary and noncapricious reason can support the distinction. See, *Morris v. Savoy* (1991), 61 Ohio St. 3d 684, 711. Under the rational basis analysis, a statute "must be upheld if there exists any conceivable set of facts under which the classification rationally further[s] a legitimate legislative objective." See, *Denicola v. Providence Hosp.* (1979), 57 Ohio St.2d 115, 116. See also, *Schwan* at 301.

c. The Same Analysis Is Applicable to Due Process and Equal Protection Challenges.

The rational basis test is identical under the two rubrics of equal protection and due process. See, *State v. Bowman*, 10th Dist. No. 02AP-1025, 2003-Ohio-5341. The only substantial difference between substantive due process and equal protection is that the legislation reviewed under equal protection involves a classification. Nowak, Rotunda & Young, Constitutional Law (3 Ed.1986) at 329 and 350-351, Sections 10.7 and 11.4. See also, *Van Der Veer v. Ohio Dept. of Transp.* (1996), 113 Ohio App.3d 60, 64, overruled on other grounds in

McMullen v. The Ohio State Univ. Hosp. (Sept. 22, 1998), 10th Dist. Nos. 97API10-1301, 97API10-1324.

Petitioners assert violations of the due process and equal protection provisions in the same manner, by attacking the legislative findings made by the General Assembly in enacting R.C. 2305.10 (C). See, Petitioners' Merit Brief at pp. 11-16, 21-22. Therefore, because the same analysis is applicable to both the due process and equal protection issues, and petitioners make the same arguments with respect to both constitutional challenges, propositions of law two and four are addressed jointly herein.

Petitioners make the blanket argument that the findings of the General Assembly are based upon "incorrect facts and misunderstandings of law," and are thus, irrational. But the constitutional issues presented do not depend upon whether petitioners, as interested litigants, believe the General Assembly's factual conclusions and inferences are incorrect or that the legislators somehow misunderstood the law. Where legislative findings have been made, this Court is required to grant substantial deference to those findings. *State v. Williams*, 88 Ohio St.3d 513, 531, 2000-Ohio-428. Similarly, courts will not invalidate legislation unless the legislature's initial determination of the law is clearly erroneous. See, *Ohio Edison Co. v. Power Siting Comm.* (1978), 56 Ohio St.2d 212, 218. Neither may be tossed aside because an interested litigant says the General Assembly simply "got it wrong."

Despite petitioners' argument to the contrary, the findings made by the General Assembly are not unreasonable. Further, conceivable facts supportive of each of the General Assembly's findings exist. Thus, the statute of repose is constitutional. See, *Denicola*.

The General Assembly's legislative objectives for enacting the statute of repose are set forth in Am. Sub. S. B. No. 80, Section (C). Petitioners take issue with Am. Sub. S. B. No. 80,

Section (C)(3) and (4), arguing that these findings only repeat basic defenses currently available to a manufacturer in a products liability action, such as:

> (3) To recognize that subsequent to the delivery of a product, the manufacturer or supplier lacks control over the product, over the uses made of the product, and over the conditions under which the product is used;
>
> (4) To recognize that under the circumstances described in division (C)(3) of this section, it is more appropriate for the party or parties who have had control over the product during the intervening time period to be responsible for any harm caused by the product.

Even if defenses relating to the misuse of a product, assumption of risk, duty to warn, and injuries caused by modifications are still available, the manufacturer must still prove these defenses through costly and time-consuming litigation. The cost of litigating these cases and the problems affiliated with gathering facts after a ten year delay still exists. Further, the existence of these defenses does not negate the General Assembly's findings that subsequent to the delivery of a product, the manufacturer or supplier lacks control over the product and the party with control over the product should be responsible for any harm caused by it. Thus, the General Assembly's findings are not based on misunderstandings of the law.

Petitioners next attack Am. Sub. S. B. No. 80, Section (C)(5), which provides that the statute of repose was enacted:

> (5) To recognize that, more than ten years after a product has been delivered, it is very difficult for a manufacturer or supplier to locate reliable evidence and witnesses regarding the design, production, or marketing of the product, thus severely disadvantaging manufacturers or suppliers in their efforts to defend actions based on a product liability claim.

Petitioners suggest that this finding is illogical because the absence of records is a greater handicap to a plaintiff trying to prove a defect and a manufacturer still will have a need to keep records of when it relinquished possession of the product to establish that the statute of repose applies, and modern technology has greatly reduced the burden of storing old records. However,

the fact that a potential plaintiff also may have a difficult time proving his claim ten years after the product was sold, simply highlights the reasonableness of the General Assembly's conclusion on why the statute of repose is necessary. Costs of litigation will increase as both parties attempt to recreate evidence lost and destroyed due to the passage of time. Such a result flies in the face of the sound public policy of judicial economy.

Further, relatively speaking, keeping a single record which establishes when a product was sold is a simple task when compared with the possibility of having to find a witness who can testify about a product's original design to prove that subsequent modifications were made by the current owner. Also, trying to prove misuse by locating witnesses who can testify about the uses for which the product was originally marketed years after that witness has left the manufacturer's employ, would be considerably more problematic than establishing the date that the product left the manufacturer's hands. Even if these witnesses are still available, modern technology can not recreate the lost memories of the product designers or marketers. Even if greater amounts of documentation can be digitally stored, the witnesses necessary to interpret the meaning of the documentation may still be unavailable due to the passage of time.

This Court has found the fading of memories and loss of evidence in the context of litigation to be prejudicial. See, *Summers v. Connolly* (1953), 159 Ohio St. 396, (statutes of repose "are considered as designed to secure the peace of society and to protect the individuals from being prosecuted upon stale claims.) See also, *Ormet Primary Aluminum Corp. v. Employers Ins. of Wasau*, 88 Ohio St.3d 292, 304, 2000-Ohio 330, (actual prejudice is shown by the passage of time because "memories fade"). A myriad of facts and memories which are pertinent to product liability claims can be obliterated, distorted or obfuscated with the passage of time. Thus, the findings of the General Assembly comport with precedent from this Court.

Next, petitioners challenge the General Assembly's statement that the statute of repose was enacted "to recognize the inappropriateness of applying current legal and technological standards to products manufactured many years prior to the commencement of an action based on a product liability claim." Am. Sub. S. B. No. 80, Section (C)(6). However, although a decade old product's design *should* not be held to modern standards, does not mean that it *will not* be so held at trial. "A jury's natural tendency to employ hindsight makes it virtually impossible to ensure that a 1950 product is judged by 1950 standards. Evidence gathered after the sale of a product, even if admitted with a limiting charge, forces a jury to make judgments based upon retroactive and 'unrealistic' standards. *** The inherent unfairness to a defendant manufacturer, in a trial occurring long after its involvement with a product, bolsters the argument for statutes of repose." McGovern, *The Variety, Policy, and Constitutionality of Product Liability Statues of Repose* (1980-1981), 30 Am. U. L. Rev. 579, 589.

Petitioners next state that the General Assembly's intent of "enhanc[ing] the competitiveness of Ohio manufacturers by reducing their exposure to disruptive and protracted liability with respect to products long out of their control" is undermined because in this case the manufacturer protected by the statute of repose is not an Ohio corporation. However, the circumstances particular to this case do not negate the fact that Ohio manufacturers will be protected by R.C. 2305.10 (C). The statute of repose still increases the finality in commercial transactions, and allows manufacturers to conduct their affairs with increased certainty. See, Am. Sub. S. B. No. 80, Section (C)(7). The standard is not whether factual scenarios may exist which conflict with the legislative findings, the question is whether the General Assembly's findings offer a reasonable basis for the lines drawn by the legislature. See, *Denicola*. There can be no doubt that a conceivable set of facts exist in which an Ohio manufacturer will benefit from

the statute of repose. Thus, the classification rationally furthers the legitimate legislative objectives set forth in Am. Sub. S. B. No. 80, Section (C)(7).

Under a rational basis standard of review, the burden of the petitioner is to demonstrate that the classification or goal at issue is irrational. *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, ¶ 27. "Where there was evidence before the legislature supporting the classification, litigants may not procure invalidation of the legislature merely by tendering evidence in court that the legislature was mistaken." *Minnesota v. Cloverleaf Creamery Co.* (1980), 449 U.S. 456, 464 101 S.Ct. 715, 66 L.Ed.2d 659. This is all petitioners have done. There is no evidence to support petitioners' contention of mistake, and even if any such evidence was tendered, given the broad discretion afforded the General Assembly in making legislative findings, any such evidence would not support a finding that R.C.2305.10 (C) is unconstitutional.

The legislative history of S.B. 80 establishes that a reasonable relationship exists between the statute of repose and the valid public policy issues that the General Assembly sought to address. Without the limitations provided for in R.C. 2305.10 (C) an indefinite group of potential claimants exists and manufacturers are confronted with the threat of defending claims when evidence is no longer available. R.C. 2305.10 (C) attempts to mitigate this situation by limiting the duration of liability and the attendant risks of stale litigation. Thus, there is a real and substantial relationship between the goals of the General Assembly and R.C. 2305.10 (C) and a rational basis supports the statute. Accordingly, this Court should overrule petitioners' constitutional challenge to the statute of repose premised on due process and equal protection.

3. Respondents' Rebuttal to Petitioners' Proposition of Law No. 3: the Statute of Repose Codified in R.C. 2305.10 Is Not an Unconstitutional Taking of Private Property under Section 19, Article I of the Ohio Constitution.

R.C. 2305.10 (C) does not violate the takings clause of the Ohio Constitution because it

does not take a property right away from litigants to whom it applies. Accordingly, petitioners' strained argument that the application of the statute of repose results in an unconstitutional taking pursuant to Section 19, Article I of the Ohio Constitution is inapplicable and meritless.

a. Petitioners' Argument Fails Because There Is No Taking at Issue.

Section 19, Article I of the Ohio Constitution provides:

> Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Petitioners are bootstrapping an argument applicable to the former Workers' Compensation subrogation statutes to the current statute of repose. This argument has no merit because the application of the statute of repose does not take any property away from petitioners.

In an attempt to establish that a property right is being taken by applying R.C. 2305.10 (C) to this case, petitioners cite to *Holeton v. Crouse Cartag Co.*, 92 Ohio St.3d 115, 2001-Ohio-109 and *Modzelewski v. Yellow Freight Systems, Inc.*, 102 Ohio St.3d 192, 2004-Ohio-2365. These cases concerned former versions of the Workers' Compensation subrogation statutes. In *Holeton*, when a settlement was reached with a third party under former R.C. 4123.931, the entire settlement amount was subject to the subrogee's statutory subrogation rights. Similarly, the version of R.C. 4123.93 at issue in *Modzelewski* failed to establish whether a double recovery existed, but instead subjected a claimant's entire judgment amount awarded in a lawsuit against a third party to the reimbursement right of the statutory subrogee. The *Holeton* case stated that "whether expressed in terms of the right to private property, remedy, or due process, the claimant-plaintiff has a constitutionally protected interest in his or her tort recovery to the extent

that it does not duplicate the employer's or Bureau's compensation outlay." Id. at 122.

Holeton and *Modzelewski* concerned the former subrogation statutes which gave the subrogee a *current collectible interest* in estimated future Workers' Compensation expenditures. See, Id. at 123. In other words, an actual sum was at issue in *Holeton* and *Modzelewski*. True monetary values were at stake in the form of either an amount awarded in judgment or an agreed settlement amount. Thus, an existing property interest of the claimant was at issue in *Holeton* and *Modzelewski* and an analysis of whether the taking was constitutional was warranted.

Here, however, there is nothing at stake beyond the mere expectation or interest based upon an anticipated continuance of existing law. See, *In re Emery* (1978), 59 Ohio App.2d 7, 11 citing, *Moore v. Bur. of Unemp. Comp.* (1943), 73 Ohio App. 362. "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *State ex rel. Horvath v. State Teachers Retirement Board*, 83 Ohio St. 3d 67, 72, 1998-Ohio-424 citing, *New York Cent. RR. Co. v. White* (1917), 243 U.S. 188, 198, 37 S. Ct. 247, 250, 61 L. Ed. 667, 672. The fact that a person is injured during the use of a product does not by that fact alone, create constitutionally protected "property interest" in him or her. Property interests are not created by the Constitution. Rather, they are created and their parameters are defined by existing rules or understandings that stem from an independent source such as state law. But a mere unilateral expectation or an abstract need is not a property interest entitled to protection. *Horvath* at 73, citations omitted. Therefore, because petitioners' mere expectation that the products liability law would remain unchanged is not a vested right, no property right is disturbed by the application of R.C. 2305.10(C). Accordingly, the statute of repose should be found to be constitutional under Section 19, Article I of the Ohio Constitution.

Application of R.C. 2305.10(C) to a products liability claim is further distinguishable

from the application of the former Workers' Compensation statutes at issue in *Holeton* and *Modzelewski* because in those cases the taking was finite. There was no other party against whom the claimant could pursue an action to recoup the "taken" funds. In contrast, R.C. 2305.10 (C) does not disturb civil actions against those in actual control and possession of a product at the time that the product causes an injury. Am. Sub. S.B. No. 80 at Section 3 (C) (8). Thus, the preclusion of a claim against the manufacturer of a product pursuant to R.C. 2305.10 (C) does not eliminate the petitioners' right to pursue its claim against the party in possession and control of the product at issue. Therefore, an opportunity to seek redress for the injury still exists. As a result, no taking has occurred.

b. Even if R.C. 2305.10(C)'s Application Results in a Taking, its Interference with a Property Right Is Reasonable and Not Arbitrary.

Assuming for the sake of argument only that a taking does occur by applying R.C. 2305.10(C), the interference with the property is not beyond the necessities of the situation. Petitioners' argument that the takings challenge is subject to a strict scrutiny analysis is without merit. Petitioners rely upon *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, in which this Court stated, "Ohio has always considered the right of property to be a fundamental right." Id at. ¶38, citing, *Reece v. Kyle* (1892), 49 Ohio St. 475, 484. The takings at issue in both *Reece* and *Norwood* are easily distinguishable from any alleged taking under R.C. 2305.10(C).

The property at issue in the *Reece* case was a *current collectable interest*. In *Reece*, a debtor assigned his rights to collect on a monetary judgment that had already been rendered in his favor to a third party. A final judgment is a vested right. See, *Sheaffer v. Westfield Ins. Co.*, 110 Ohio St.3d 265, 2006-Ohio-4476, (Lundberg Stratton, J. dissenting).Thus, unlike a litigant's anticipation that a law will remain in its current form, an actual quantifiable amount of personal property was at issue in *Reece*.

The eminent domain statute at issue in *Norwood* is also distinguishable. The *Norwood* decision involved the controversial act by a municipality of taking an individual's property by eminent domain and transferring the property to a private entity for redevelopment. The heightened standard applied in *Norwood* was based upon the significance of the taking of real property at issue. In analyzing the appropriation of real property, this Court recognized that "[f]or the individual property owner, the appropriation is not simply the seizure of a house. It is the taking of a home - the place where ancestors toiled, where families were raised, where memories were made." *Norwood* did not involve a mere expectation of a future interest, but the type of taking characterized as a physical invasion by the government. See, *Horvath* at 70. Thus, the constitutional analysis applied in *Norwood* is not applicable here. Petitioners never possessed a vested property right, thus, the application of R.C. 2305.10 (C) cannot result in a taking under Ohio's Constitution. Therefore, the heightened standard used in analyzing the eminent domain statute at issue in *Norwood* is not applicable herein.

Further, petitioners rely upon *Holeton* and *Modzelewski* as the basis for their argument that property rights are taken away by the application of R.C. 2305.10 (C). In both *Holeton* and *Modzelewski*, this Court reviewed the statutes at issue under a reasonableness standard. Should this Court determine that actual property rights are in fact at issue in this case, then the same analysis applied in the *Holeton* and *Modzelewski* decisions is applicable.

As stated in *Holeton,* any legislation affecting private property rights must be reasonable, not arbitrary and must confer upon the public a benefit commiserate with its burdens upon private property. Id. at 121, citing *Direct Plumbing*, at 546. The state in the passage of general laws may not make any regulations which are unreasonable. Id. "The means adopted must be suitable to the ends in view, they must be impartial in operation, and not unduly oppressive upon

individuals, must have a real and substantial relation to their purpose and must not interfere with private rights beyond the necessities of the situation." Id.

The findings and intent of the General Assembly in enacting R.C. 2305.10 (C) described in Section 2 of this brief, establish that the means adopted by the legislature are suitable to the ends in view. Any private rights with which the statute interferes, are not interfered with beyond the necessities of the situation. Accordingly, because R.C. 2305.10 (C) does not violate Section 19, Article I of the Ohio Constitution, R.C. 2305.10 (C) should be upheld as constitutional as applied to petitioners' claims.

4. Respondents' Rebuttal to Petitioners' Proposition of Law No. 5: R.C. 2305.10 (C), is Constitutionally Retroactive and Does Not Violate Section 28, Article II of the Ohio Constitution.

R.C. 2305.10 does not violate the Ohio constitution's ban on retroactivity. Section 28, Article II of the Ohio Constitution provides that "[t]he general assembly shall have no power to pass retroactive laws ***." Section 28, Article II of the Ohio Constitution has been interpreted as allowing laws to be applied retroactively if there is an expressed legislative intent to do so, and the law affects a remedial, not substantive, right. See, *State ex rel. Romans v. Elder Beerman Stores Corp.*, 100 Ohio St.3d 165, 2003-Ohio-5363, ¶11; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, at paragraph one and three of syllabus. When an expressed intent for retroactivity is found, a determination as to whether the law is substantive or remedial is required. See, *Van Fossen* at paragraph three of syllabus.

The General Assembly intended the statute of repose to be applied retroactively. R.C. 2305.10(G), as enacted by S.B. 80, provides:

> This section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after April 7, 2005, in which this section is relevant, regardless of when the cause of action accrued and notwithstanding any other section of the Revised Code or prior rule

of law of this state, but shall not be construed to apply to any civil action pending prior April 7, 2005.

Accordingly, a determination as to whether the law is substantive or remedial is required. A statute is unconstitutionally retroactive only "if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Bielat v. Bielat*, 87 Ohio St.3d 350,354, 2000-Ohio-451. "[T]he constitutional test for substantive legislation focuses on new laws that reach back in time and create new burdens, deprivation, or impairments of *vested rights*." (Emphasis added.) Id. at 359.

Petitioners do not have a vested right which is being impaired by R.C. 2305.10 (C). As noted in the dissenting opinion of *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, a "vested right" is a right that "'so completely and definitely belongs to a person that it cannot be impaired or taken away without that person's consent.'" Id. at ¶20, citing, *Harden v. Ohio Atty. Gen.*, 101 Ohio St.3d 137, 2004-Ohio-382, ¶9, quoting Black's Law Dictionary (7th Ed.1999) 1324. "A right is not regarded as vested in the constitutional sense unless it amounts to something more than a mere expectation or interest based upon an anticipated continuance of existing law." *In re Emery*, 59 Ohio App.2d at 11, citing *Moore*. For example, a judgment usually creates a vested right. See, e.g., *Wright v. Cincinnati Ins. Co.*, 159 Ohio App.3d 154, 2004-Ohio-5932, ¶31.

In *Smith*, three justices of this Court did not believe that a vested right had been created even though a judgment had been rendered. Id. at ¶21 (in which the judgment rendered was potentially subject to subsequent modification.) See also, *Sheaffer*, supra (Lundberg Stratton, J. dissenting) (rights do not vest until the appellate process concludes, thus, a party may not claim a vested right until there is a final judgment.) Petitioners do not have a judgment upon which to rely in support of their contention that a vested right will be impaired by the statute of repose. In

fact, when the statute of repose was enacted, this lawsuit had not yet even been commenced. Injury alone does not create a vested right, certainly without the affirmative act of filing suit to seek compensation for the injury.

As explained by this Court in *Cowen v. State ex rel. Donovan* (1920), 101 Ohio St. 387, claims pending in court are afforded protection from legislative acts because applying a legislative act to a pending case encroaches upon the province of the court. See, Id. at 398. Thus, with respect to *pending cases* the Constitution confers judicial power upon the courts, and withholds the *pending action* from the province of the legislature. See, Id. The distinction between the protections afforded to an injury and a commenced action is highlighted in this Court's decision in *Payne v. Keller* (1969), 18 Ohio App.2d 66 (affirmed by this Court without opinion, *Gregory v. Flowers* (1972), 32 Ohio St.2d 48, 55). *Payne* concerned a change in the Workers' Compensation statute that required a claimant to identify specific injured body parts within two years of the injury to have a claim for that body part. The statute, enacted *after* the claimant's injury, barred him from filing a subsequent application to modify his original application for compensation. *Payne* held that the statute could not be applied to bar the claim because the claim was *filed prior* to the enactment of the change in the statute. However, the amendment to the Workers' Compensation statute would apply "to claims for compensation and application for modification of awards *filed after its effective date*." (Emphasis added.) Id. at paragraph three of syllabus. In other words, although a substantive right was affected, the change in the law was applicable to claims filed after the statute's enactment, despite the fact that the injury occurred prior to the enactment of the legislation. Whether a legislative act applies to an injury is triggered by when a claim for compensation for that injury is filed. Here, although the injury occurred prior to the enactment of R.C. 2305.10 (C), the lawsuit was filed after the

enactment and is, thus, subject to the statute of repose.

The General Assembly limited application of R.C. 2305.10(C) to "civil action[s] commenced on or after April 7, 2005, *** but shall not be construed to apply to any civil action pending prior April 7, 2005." R.C. 2305.10(G). This case was filed on June 2, 2006, well after April 7, 2005. Pursuant to the holding in *Payne*, even if an injury occurs prior to the effective date of R.C. 2305.10(C), the statute of repose may still be applied when the complaint to pursue the claim premised on that injury is filed after the statute's effective date. Thus, because petitioners' case was filed after the effective date of the statute of repose, it may be applied to bar petitioners' current action.

The statute of repose is to apply in a remedial manner to actions commenced after the date of its enactment. This suit was commenced on June 6, 2006, after the enactment of S.B. 80 on April 7, 2005. Thus, R.C. 2305 (C) is to be applied in a remedial fashion. A statute that is remedial does not violate Section 28, Article II of the Ohio Constitution, even when it is retroactively applied. See, *Bielat* at 354. See also, *Van Fossen* at 107.

This matter is also distinguishable from *Hardy*, supra, on which petitioners rely. In *Hardy*, this Court struck down the medical malpractice statute, R.C. 2305.11 (B), which barred Hardy's claim before he was aware of his injury. Two significant facts exist which distinguish the instant matter from the situation in *Hardy*. Unlike petitioners, Hardy's claim was immediately barred, without the slightest amount of time to pursue a claim. Here, a window of time existed between the date on which Mr. Groch was injured and the date of the enactment of the statute of repose. Mr. Groch was injured prior to the enactment of R.C. 2305.10(C) but the instant claim was brought subsequent to its enactment. The statute of repose is comparable to a statute of limitations which relates to a remedy. See, *Gregory*, 32 Ohio St.3d at 53. Except

where constitutional provisions expressly forbid, the Legislature has power to make, amend, and repeal laws relating to the remedy, and make the same applicable, not only to *existing causes of action*, but even in pending suits. (Emphasis added.) Id. Even assuming, for the sake of argument that petitioners had a vested property right upon injury, and thus at the time of the enactment of R.C. 2305.10(C), "it does not conclusively follow that the time within which the right may be asserted and maintained may not be limited to a shorter period than that which prevailed at the time the right arose, provided such limitation still leaves the claimant a reasonable time within which to enforce the right." *Gregory* at 54, citing, *Smith v. The New York Central Rd. Co.* (1930), 122 Ohio St.45. ("*New York Central*").

The situation here is whether R.C. 2305.10 (C) can be constitutionally applied to bar claims of product liability litigants who are injured prior to the enactment of the statute of repose, but do not bring their claims until after its enactment. In *New York Central,* this Court considered the applicability of an amendment to an existing cause of action which had not been brought at the time the amendment went in to effect. See Id. at 55. This Court determined that "since the claimant in the case had had 90 days in which to file his action under the repealed law, 'a reasonable time in which to enforce' his right had been allowed." *Gregory* at 54, citing, *New York Central.* Although this Court questioned the analysis of *New York Central*, it did not overrule it. Id. Here, a reasonable window of time also existed between the date of Mr. Groch's injury and the enactment of R.C. 2305.10(C). Thus, the statute of repose applies to this claim.

Based on the foregoing, R.C. 2305.10 does not violate Section 28, Article II of the Ohio Constitution and can be retroactivity applied.

5. Respondents' Rebuttal to Petitioners' Proposition of Law No. 6: Sb 80 Does Not Violate Section 15, Article II of the Ohio Constitution's One-Subject Rule.

a. The History of the Application of the One-Subject Standard Under Section

15(D), Article II Of The Ohio Constitution.

The purpose of the one-subject rule is "to prevent so-called 'log rolling' - 'The practice of several minorities combining their several proposals as different provisions of a single bill and thus consolidating their votes so that a majority is obtained for the omnibus bill where perhaps no single proposal of each minority could obtain the majority approval separately.'" *State ex rel. Ohio Civil Serv. Employees Ass'n v. State Employment Relations Board* ("SERB"), 104 Ohio St. 3d 122, 2004-Ohio-6363, ¶*26,* citing, *State ex rel. Dix v. Celeste* (1984), 11 Ohio St. 3d 141, 142. As recognized in *SERB,* under Section 15(D), Article II, this Court's "role in the enforcement of the one-subject provision is limited," to "afford the General Assembly 'great latitude in enacting comprehensive legislation by not construing the one-subject provision so as to unnecessarily restrict the scope and operation of laws, or to multiply their number excessively or to prevent legislation from embracing in one act all matters properly connected with one general subject.'" 104 Ohio St. 3d at ¶27. Otherwise, the rule "become[s] a tool for those disgruntled with new legislation to easily attack it when there is no legitimate basis on which to challenge the legislation." 104 Ohio St. 3d at ¶60, (Lundberg Stratton, J., dissenting.)

The standard for evaluating an act's compliance with the one-subject provision, its application to the specific legislation at hand and the effect of a one-subject violation has received varied treatment since this Court's decision in *Dix.* In *Dix,* this Court upheld the constitutionality of a bill under a one-subject challenge reasoning that Section 15(D), Article II, was "merely directory in nature" and only a "manifestly gross and fraudulent violation of this rule will cause an enactment to be invalidated. " Id. at syllabus. This Court reasoned that "[t]he one-subject provision is not directed at plurality but at disunity in subject matter." Id. at 146.

This Court's subsequent decision in *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*

(1991), 62 Ohio St. 3d 145, suggested a more aggressive examination of the one-subject rule. SERB, 104 Ohio St. 3d at ¶74, (Lundberg Stratton, J., dissenting.) This shift resulted in decisions where instead of eliminating an entire legislative enactment based on a one-subject violation, this Court took measures to excise the offending provisions. For example, in *Hinkle*, despite finding a one-subject violation, the Court upheld the constitutionality of the larger bill while severing the provision it deemed unrelated to the bill's subject. In *State ex rel. Ohio AFL, CIO v. Voinovich*, 69 Ohio St. 3d 225, 1994-Ohio-1, this Court excised two offending provisions from a bill which dealt with a variety of Workers' Compensation related matters, finding that the remaining provisions were not so unrelated to constitute a "manifestly gross and fraudulent violation" of the one-subject rule. The two offending provisions were excised as unconstitutional since they lacked a clear, relationship with the other topics of the larger bill which was upheld.

In *SERB*, Chief Justice Moyer aptly described the operative rule:

> True to that legislative deference we have stated that "'the mere fact that a bill embraces more than one topic is not fatal, as long as a common purpose or relationship exists between the topics'" *Sheward*, 86 Ohio St. 3d at 496. *** To conclude that a bill violates the one-subject rule, a court must determine that the bill includes a disunity of subject matter such that there is "no discernable, practical, rational or legitimate reason for combining the provisions in one Act." *Beagle v. Walden* (1997), 78 Ohio St. 3d 59, 62, 1997 Ohio 234, 676 N.E. 2d 506.

104 Ohio St. 3d at ¶28.

Petitioners' attack on S.B. 80 begins and ends with *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 51, 1999-Ohio-123, arguing that it "held that 'tort reform' is not a single subject with a plurality of topics, but rather a heading encompassing multiple subjects"and that SB 80 "is remarkably similar to HB 350." Petitioners' Merit Brief, p. 29,31. However, *Sheward*, has proven to be the exception to the general approach adopted by this Court. The General Assembly is afforded "great latitude in enacting comprehensive legislation"

and courts must presume [that] statutes are constitutional." *Hoover v. Franklin Cty. Bd. of Commrs.* (1985), 19 Ohio St. 3d 1, 6. The one-subject provision is "not directed at plurality, but at disunity of subject matter." *Dix,* 11 Ohio St. 3d at 146. Thus, when the proper balance is struck, a constitutional challenge will fail where the petitioner, as here, narrowly describes the subject matter of the bill in an effort to find a one-subject violation, and then argues that the entire bill should be stricken.

Petitioners' artificial expansion of so-called subject matter "disunity" threatens to create serious legislative dysfunction that "will impede the legislative process rather than protect against 'manifestly gross and fraudulent violations of the one-subject rule.'" *SERB*, 104 Ohio St. 3d at ¶79, (Lundberg Stratton, J., dissenting.) As stated in *Dix*, the constitutional presumptions require deference and wide latitude in the definition of what constitutes a single subject:

> It further recognizes that there are rational and practical reasons for the combination of topics on certain subjects. It acknowledges that the combination of provisions on a large number of topics, as long as they are germane to single subject, may not be for purposes of logrolling but for the purposes of bringing greater order and cohesion to the law or of coordinating an improvement of the law's substance.

Dix, 11 Ohio St. 3d at 145.

This Court's most recent pronouncements in this area make clear that the standard is well defined and capable of reasoned application without inconsistent results. In *In re Nowak*, 104 Ohio St. 3d 466, 2004-Ohio-6777, at paragraph one of syllabus, this Court held:

> A manifestly gross and fraudulent violation of the one-subject provision *** will cause an enactment to be invalidated. Since the one-subject provision is capable of invalidating an enactment, it cannot be considered merely directory in nature.

In modifying the prior decision in *Dix*, however, this Court continued a pragmatic approach of severing the offending provision from the larger bill. Thus, *Nowak* held that former R.C. 5301.234 was unconstitutional under the "disunity of subject matter" standard because of a

mortgage-recording provision. The overall bill, Am. Sub. H.B. 163, contained thirty-one sections, amending, enacting or repealing over fifty sections of the Revised Code, *but only the offending statutory provision was excised.* See, Id. at ¶59. Likewise, in *SERB*, a single offending provision was severed from the balance of a wide ranging appropriation bill. See, Id. at 131.

b. S.B. 80 Does Not Violate The One-Subject Provision of Article II, Section 15(D) of the Ohio Constitution

Petitioners' argument seeks to void all of S.B. 80 simply because it includes provisions: (1) for the state Dental Board to issue "volunteer certificates" for retired dentists (R.C. 4715.42), (2) which specify the individuals qualified to use the "Advanced Practical Nurses" designation (R.C 4723.01, et seq.), (3) which create an Ohio Subrogation Rights Commission[10]; (4) which request in an uncodified section that this Court create a "Legal Consumers Bill Of Rights."[11] Petitioners' one-subject argument must be rejected.

Petitioners' position that provisions of S.B. 80 which have nothing to do with the legal issues in *this* product liability case should lead to the invalidation of the entire Bill is absurd. It is tantamount to allowing the non-applicable, irrelevant tail sections to wag the one-subject dog, obliterating the otherwise obvious common purpose or relationship between the topics of the remaining S.B. 80 provisions. The provisions of S.B. 80 all have a common purpose and relationship, supported by a "discernable practical, rational or legitimate reason for combining the provisions in one act." *SERB*, 104 Ohio St. 3d at ¶28. With the possible exception of the proposed amendments to R.C 4715.42 and R.C 4723.01, et seq., the remaining provisions relate

[10]The workers compensation subrogation provisions are not merely about "insurance law", but directly related to the vast majority of civil tort actions for bodily injury.

[11] Of course, this item above is, strictly speaking, not statutory law at all.

to the reform of our civil justice system in tort actions. The provisions of S.B. 80 pertain to changes in the law of torts and other civil actions and may be commonly referred to as "tort reform." Indeed, it is obvious that petitioners' blunderbuss constitutional challenge to all the provisions of S.B. 80 is being brought precisely because, upon analysis and reflection, the bill *does* "embrace[] in one act all matters properly connected with one general subject." *Dix,* 11 Ohio St. 3d 145. There is one-subject of S.B. 80 with a plurality of topics, all with a common purpose or relationship to the reform of the law and evidence applying to civil tort actions.

Petitioners erroneously argue that legislation cannot cover a broad subject such as "tort reform" without violating Section 15(D), Article II of the Ohio Constitution. *Sheward* did not reject H.B. 350 because the phrase "tort and other civil actions" appeared in the title of the Act, but because it encompassed far too many topics under this general phrase. See, *Sheward* at 499. "Disunity of subject matter, *not aggregation*, is the polestar in assessing a violation of the one-subject rule." *Nowak*, 104 Ohio St.3d at ¶59.

This Court has upheld very broadly titled legislation under the one subject rule. In *Hinkle*, this Court analyzed Am.Sub.H.B. No. 200, describing its "subject" as "mainly address[ing] matters pertaining to the state judicial system." Id. at 146. However, one section of H.B. 200, Section 7, was a liquor control law. The court found no common purpose between Section 7 and the remainder of H.B. 200 and severed the offending portion of the bill to cure the defect, but saved the remainder of H.B. 200 finding that these portions "do relate to a single subject," that subject being the broadly defined "matters pertaining to the state judicial system." See, id. at 146, 149.

"The mere fact that a bill embraces more than one topic is not fatal, as long as a common purpose or relationship exists between the topics." *Hoover,* 19 Ohio St. 3d at 6. Whether the

subject of S.B. 80 is described as "tort law and civil actions," "tort reform" or "civil justice reform," the common purpose relating to each provision of S.B. 80 is to reform Ohio's tort laws by striking a balance between the rights of civil litigants in Ohio. Am. Sub. S.B. 80, Section (3)(A)(2). Thus, Petitioner's arguments that a one-subject violation must invalidate the entire Act in toto are unpersuasive. While Petitioner's Merit Brief spends six pages of argument suggesting that the practice of "severing" offending provisions of the enactment from the non-one-subject provisions is impractical, nowhere do petitioners identify the provision (or provisions) it suggests are offending and capable of severing. The reason is obvious. The only portions of S.B. 80 that the petitioners argue offend the one-subject provision are the statutory amendments with respect to volunteer certificates for retired dentists and the definition of what nurses in the state can utilize the A.P.N. designation. Petitioners clearly understand that were this Court to determine that *those* two provisions do not fall within the otherwise obvious one-subject purpose of S.B. 80, their severance as unconstitutional would be of no benefit to petitioners in this case. Petitioner's arguments on the unconstitutionality of the bill fail.

As noted above, petitioners' main line of attack is that this Court's decision in *Sheward* requires a finding of unconstitutionality of S.B 80 in toto. Petitioner asserts that "S.B. 80 is remarkably similar to H.B. 350," but *Sheward* offers no precedential authority for striking down S.B. 80. *Sheward* dealt with former H.B. 350. The statutes at issue in H.B. 350 are not the laws at issue here. Indeed, the syllabus of *Sheward* is explicitly tied to H.B. 350 and is no broader, than that bill.

Petitioners' attempt to draw a parallel between H.B. 350 and S.B. 80 fails on even a cursory comparison of the two Acts. As this Court held in *Sheward*, H.B. 350 affected "some eighteen different titles, thirty-eight different chapters, and over one hundred different sections of

the Revised Code, as well as procedural and evidentiary rules and hitherto uncodified common law." *Sheward,* 86 Ohio St. 3d at 498. By comparison, S.B. 80 is more limited, affecting only 9 titles, and as petitioners concede, about half of the sections of the Revised Code altered by H.B. 350. See Petitioners' Merit Brief at p. 29.

This Court summed up the expansive scope of H.B. 350:

> Am.Sub.H.B. No. 350 *** combine(s) the wearing of seat belts with employment discrimination claims, class actions arising from the sale of securities with limitations on agency liability in actions against a hospital, recall notifications with qualified immunity for athletic coaches, actions by a roller skater with supporting affidavits in a medical claim and so on.

Id. 499.

These two pieces of legislation are entirely different in scope, the number of chapters and sections of the Revised Code affected largely tells the story. S.B. 80 affects *half* as many titles of the Revised Code and a similarly limited number of sections. It does not attempt to revise provisions ranging from securities to prejudgment interest to roller skaters. Thus, petitioner's attempt to equate H.B. 350, which revised or adopted over 100 sections of the Revised Code with S.B. 80, which pertains to half as many sections, is baseless.

While petitioners pay lip service to the proposition that the one-subject provision should not be applied to say that General Assembly can never pass comprehensive legislation, they urge a position that would effectively prohibit the General Assembly from addressing a plurality of topics within one overarching subject matter. S.B. 80 encompasses the reform of various common-law rules and statutes relating to civil causes of action in tort. This common purpose runs through its provisions, and given the deferential standard applied to the one-subject constitutional challenge, petitioners' request to invalidate S.B. 80 in toto should be denied by this Court.

6. **Respondents' Rebuttal to Petitioners' Proposition of Law No. 7: the Workers' Compensation Subrogation Statutes Do Not Violate the Due Process Clause of Section 16, Article I of the Ohio Constitution.**

7. **Respondents' Rebuttal to Petitioners' Proposition of Law No. 8: the Workers' Compensation Subrogation Statutes Do Not Constitute an Improper Taking and Do Not Violate Section 19, Article I of the Ohio Constitution.**

8. **Respondents' Rebuttal to Petitioners' Proposition of Law No. 9 : the Workers' Compensation Subrogation Statutes Does Not Violate Section 2, Article I of the Ohio Constitution.**

The seventh, eighth and ninth certified questions ask this Court to consider the constitutionality of R.C. 4123.93 and 4123.931, the Ohio workers' compensation subrogation statutes, as amended in S.B. 227, effective April 9, 2003 ("subrogation statutes".) These statutes create an independent right of recovery in favor of statutory subrogees against third parties. The statutory subrogee is subrogated to a plaintiff's rights against third-party tortfeasors with respect to past, present, and estimated future payments of workers' compensation benefits.

The changes made to R.C. 4123.931 in S.B. 227 were in response to this Court's decision in *Holeton*, supra, which held that former R.C. 4123.931 violated Sections 2, 16, and 19 of Article I of the Ohio Constitution. See, *State ex. rel. United Auto., Aerospace & Agricultural Implement Workes of Am. v. Bur. Of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327 at ¶17 ("The manifest objective of the General Assembly in enacting S.B. 227 was to comply with our holding in *Holeton*.") While the *Holeton* court found the prior subrogation statute unconstitutional, it also opined that a subrogation statute would not necessarily violate the Workers' Compensation provision of the Ohio Constitution, Section 35, Article II, Ohio Constitution. Therefore, the legislature may constitutionally enact a subrogation statute. *Holeton*, 92 Ohio St.3d at 120. The subrogation statutes enacted by the General Assembly in S.B. 227 should be upheld by this Court because R.C. 4123.93 and 4123.931 comply with the

mandates of Sections 2, 16 and 19, Article I of the Ohio Constitution.

a. The Statutes Allowing Subrogation for Workers' Compensation Benefits, R.C. 4123.93 and 4123.931, Do Not Violate the Takings or Due Process Clauses, Set Forth in Sections 16 and 19, Article I, of the Ohio Constitution.

Petitioners' arguments that R.C. 4123.93 and 4123.931 offend due process or constitute an uncompensated taking under Sections 16 and 19, Article I, of the Ohio Constitution, are addressed jointly as the *Holeton* court did when reviewing the predecessor statutes to the current R.C. 4123.93 and 4123.931. Any legislation affecting private property rights must be reasonable, not arbitrary and must confer upon the public a benefit commiserate with its burdens upon private property. *Holeton* at 121, citing *Direct Plumbing Supply Co.*, 138 Ohio St. at 546. The state in the passage of general laws may not make any regulations, which are unreasonable. *Holeton*, citing, *Froelich v. City of Cleveland* (1919), 99 Ohio St. 376, 391. "The means adopted must be suitable to the ends in view, they must be impartial in operation, and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose and must not interfere with private rights beyond the necessities of the situation." Id. at 121.

As stated in *Holeton*, "whether expressed in terms of the right to private property, remedy, or due process, the claimant-plaintiff has a constitutionally protected interest in his or her tort recovery to the extent that it does not duplicate the employer's or bureau's compensation outlay." Id. at 122. In analyzing the prior subrogation statute, the *Holeton* court acknowledged that the state of Ohio has a legitimate interest in preventing double recoveries and that "it is constitutionally permissible for the state to prevent a tort victim from recovering twice." Id.

In support of their position that the subrogation statutes violate Section 19, Article I of the Ohio Constitution, petitioners argue that R.C. 4123.93 and 4123.931 take money for future benefits and under the assumption that there will be a double recovery, while failing to provide a

vehicle for claimants to recoup funds paid in excess of actual future expenditures. Likewise, in arguing that the subrogation statutes violate Section 16, Article I of the Ohio Constitution, petitioners assert that the statutes wrongfully presume a double recovery exists and that claimants are left without an opportunity to dispute the presumption.

The *Holeton* court found that former R.C. 4123.931(A), by giving the statutory subrogee a current collectible interest in estimated future expenditures, created the potential for an unlawful taking because the statute could operate to provide the subrogee with a windfall at a claimant's expense. Instead of preventing double recovery, former R.C. 4123.931(A) "require[d] the claimant to reimburse the bureau or self-insuring employer for future benefits that the claimant may never receive." Id. at 123. This would happen when compensation was terminated earlier than the estimated termination date used for deciding future values. Thus, *Holeton* determined that the former statute irrationally and arbitrarily placed the risk of overestimating future benefits on the claimant. Id. at 125.

In S.B. 227, the legislature created a system that guarantees that any risk of estimating future values is not placed on a claimant. Under the current version of R.C. 4123.931, the statutory subrogee does not have a current collectible interest in estimated future expenditures. Nor does the new statute require the claimant to reimburse the statutory subrogee for future benefits that the claimant may never receive. The current R.C. 4123.931 (E) permits the claimant to establish an interest-bearing trust account for the full amount of the subrogation interest that represents estimated future payments of compensation and benefits. If the claimant establishes a trust account, every six months the statutory subrogee must provide a payment notice to the claimant, listing the amounts paid on the claimant's behalf. The claimant must then reimburse the subrogee from the trust account in accordance with the notice. If the subrogee's

duty to continue making payments is terminated, any amount that remains in the trust account, after final reimbursement is paid to the subrogee, must be paid to the claimant or the claimant's estate.

The *Holeton* court found that former R.C. 4123.931 was irrational and arbitrary because it imposed the risk of liability for overestimating future expenditures upon the claimant. The new statute removed this risk by providing for the creation of a trust account. Now the subrogee is reimbursed only for amounts actually expended up to the amount placed in trust. *Fry v. Surf City Inc.*, 137 Ohio Misc.2d 6, 2006-Ohio-3092, ¶16.

Despite petitioners' argument to the contrary, the creation of a trust account does not pose an undue burden upon a claimant. First, it is the claimant's option to create the trust account. If a claimant does not establish a trust account under division (E)(1), the claimant may elect to pay the future benefits up front. R.C. 4123.931 (F). Petitioners assert that the cost of maintaining such an account is detrimental to the claimant because of the amount of fees necessary to maintain such an account. However, petitioners fail to acknowledge that this problem is alleviated by R.C. 4123.931(E)(2) which authorizes the claimant to use the interest that accrues on the trust account to pay the expenses associated with the account. Finally, once the trust account is established, the burden is on the subrogee to submit a payment notice to the claimant every six months. R.C. 4123.931(E)(3). The subrogation statutes make no provision for reimbursement in the absence of a timely payment notice. *Fry* at ¶17. R.C. 4123.931(E) requires only monies representing the future interest to be placed into the trust account.

Further, the trust fund concept in the present versions of R.C. 4123.931(E) and (F) is modeled after a Minnesota statute which the *Holeton* Court cited with approval. *Holeton,* at 124. Minn. Stat. 176.061 provides a formula under which the employer can obtain reimbursement for

compensation paid, and provides that remaining tort proceeds should be paid to the claimant and constitute a credit to the subrogee against future compensation payments. Like the Minnesota statute, the current version of R.C. 4123.931 does not require the claimant to reimburse the statutory subrogee for future benefits the claimant may never receive.

Under the present version of R.C. 4123.931, the claimant may keep proceeds remaining after the statutory subrogee's duty to continue making payments on the claim ends. Therefore, the current versions of the statute legitimately guard against any windfall for the statutory subrogee, and simultaneously do away with the claimant's former burden regarding the risk of overestimating liability for future values. *McKinley v. Bur. of Workers' Compensation,* 4th Dist. No. 06CA7, 2006-Ohio-5271. The trust fund created by the General Assembly in S.B. 227 corrects the constitutional infirmity cited by *Holeton.* There is now no risk to the plaintiff that future benefits may be estimated too high. *Fry* at ¶19. The trust account provision in R.C. 4123.931 is a reasonable, rational, nonarbitrary response to the legitimate concern of preventing double recoveries and complies with the holding in *Holeton.* Id. Thus, S.B. 227, as it addresses the estimated future value issue, is constitutional. Id.

Petitioners also contend that the subrogation statutes assume there will be a double recovery in a settlement, and provide no process by which parties can determine what is a fair award for all economic and non-economic losses, as well as past and future injuries. Specifically, petitioners argue that the formula employed by R.C. 4123.931(B) and (D) to determine how a recovery by the claimant against a third-party tortfeasor will be distributed deprives the claimant of the opportunity to show there was no double recovery.

The pro rata formula established by the subrogation statutes determines the interests of the statutory subrogee and the claimant. The formula is applied equally to settlements and to

awards following trial. R.C. 4123.931(B) and (D). Despite petitioners' argument to the contrary, the formula does ensure that the statutory subrogee is reimbursed only from amounts that would constitute an impermissible double recovery. *Fry* at ¶23. The formula works to provide a pro rata distribution of the net amount recovered by the claimant through either a settlement or trial award to the statutory subrogee and the claimant. R.C. 4123.931(B) and (D). The subrogation statutes ensure that the subrogee does not unconstitutionally take more from the claimant than what would represent a double recovery by never allowing the statutory subrogee to collect more that its pro rata share of the net amount recovered. *Fry* at ¶23.

Further, in the event that the claimant objects to the recovery calculation rendered by the formula, R.C. 4123.931 outlines alternative procedures to determine the respective amounts to be recovered by the claimant and the subrogee. R.C. 4123.931 provides several methods for determining how a recovery by the worker's compensation claimant against a third-party tortfeasor is to be distributed. See, *McKinley* at ¶26. The claimant has the option of joining the Bureau or a self-insured employer as a party to the underlying tort action. Once the subrogee is a party, if the parties are unable to agree on a settlement amount under R.C. 4123.931(B), the matter may proceed to trial. The statutory subrogee presents evidence at trial regarding its expenditures on behalf of the claimant and other evidence regarding its entitlement for future damages. The subrogation amount can be determined as part of the damages proven through use of jury interrogatories submitted by the court pursuant to Civ.R. 49(B). See, R.C. 4123.931(D).

If the claimant does not join the Bureau or a self-insured employer as a party to the underlying tort action, and has settled with the tortfeasor without the participation of the Bureau or the self-insured employer, the Bureau and the claimant may choose to use the aforementioned formula, some other mutually agreed to allocation, or seek a declaratory judgment to determine

the respective amounts to be recovered by the claimant and the subrogee. R.C. 4123.931 (B). If the case proceeds to trial, the claimant may present evidence as to what portions of the amount recovered represent a double recovery. R.C. 4123.931(D)(2). These options ensure that the claimant will obtain a full and fair hearing. See, *McKinley* at ¶27.

Additionally, the parties may lawfully settle at any time. R.C. 4123.931(B) provides the parties with the option to use the formula or any other agreed upon allocation of the net amount recovered. The parties are free to agree to any allocation they deem proper. If the parties cannot agree, the issue can be resolved at trial. This option also provides a claimant with the opportunity for a full, fair hearing. Therefore, each of the procedures set forth in R.C. 4123.931 provides a claimant with due process when determining how a recovery by the worker's compensation claimant against a third-party tortfeasor is to be distributed. *McKinley* at ¶28.

Based on the foregoing, the subrogation statutes as enacted in S.B. 227 do not violate Sections 16 and 19, Article I of the Ohio Constitution, as the new statutes afford claimants a fair and reasonable opportunity to demonstrate what part of a settlement or judgment represents double recovery. The current versions of R.C. 4123.93 and R.C. 4123.931 are reasonable, not arbitrary and the burdens upon private property are commiserate with the benefit of upholding the state's legitimate interest in preventing double recoveries. Therefore, this Court should answer certified questions numbers seven and eight in the negative.

b. R.C. 4123.93 and 4123.931 Do Not Violate the Equal Protection Clause, Article I, Section 2, of the Ohio Constitution.

Petitioners argue that the subrogation statutes draw an unconstitutional distinction between claimants that settle their claims and those who proceed to trial. Specifically, petitioners argue that R.C. 4123.931 disparately treats settling and non-settling claimants because R.C. 4123.931(B) provides mechanisms for settling claimants that are not available to those who try

their cases. R.C. 4123.931(B) provides that if while attempting to settle, a claimant and statutory subrogee cannot agree to the allocation of the net amount recovered, the claimant and statutory subrogee may file a request with the administrator of the BWC for a conference to be conducted by a designee appointed by the administrator, or the claimant and statutory subrogee may agree to utilize any other binding or non-binding alternative dispute resolution process to resolve the issue. See, Id. Petitioners maintain that those claimants who try their cases are not afforded the same mechanisms for determining the net amount recovered. Petitioners argue that the distinction is irrational and denies equal protection of the law to those claimants who choose to try their claims.

The mechanisms in R.C. 4123.931(B) are unnecessary when a claimant tries his case because disagreements can be resolved through formal litigation. Once the subrogee is a party to an action, if the parties are unable to agree on a settlement amount under R.C. 4123.931(B), the matter may proceed to trial. The statutory subrogee presents evidence at trial regarding its expenditures on behalf of the claimant and other evidence regarding its entitlement for future damages. The subrogation amount can be determined as part of the damages proven through use of jury interrogatories submitted by the court pursuant to Civ.R. 49(B). Thus, a claimant who opts to try his claim is provided with the opportunity for a full, fair hearing.

Under the rational-basis test, a challenged statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthers a legitimate legislative objective. *Schwan*, 6 Ohio St.3d at 301. The party challenging the constitutionality of an enactment has the burden to negate "every conceivable basis which might support it." *Heller v. Doe* (1993), 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257; *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.* (1999), 87 Ohio St.3d 55, 60, 1999-

Ohio-248. The fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. See, *United States v. Salerno* (1987), 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697; *Emerson Elec. Co. v. Tracy*, 90 Ohio St.3d 157, 162, 2000-Ohio-174.

Here, a conceivable set of facts under which the classification rationally furthers a legitimate legislative objective exists. Both settling and non-settling claimants are afforded meaningful opportunities to be heard on disputes arising from a determination of the allocation of the net amount recovered. Settling claimants can seek review from the BWC administrator or through alternative dispute resolution. Non-settling claimants have an opportunity to be heard at trial.

R.C. 4123.931 is a rational response to the legitimate state concern of minimizing losses to the Workers' Compensation fund caused by the acts of third-party tortfeasors. This is a legitimate state concern to the extent that it prevents double recovery. *Holeton* at 121. Claimants are given substantial opportunity in either a trial or a settlement to prove amounts that would not represent a double recovery. Thus, R.C. 4123.931 is a rational response to a legitimate state concern.

CONCLUSION

For all of the above reasons, Respondents, Kard Corporation and Racine Federated, Inc., National/Kard Division, respectfully request that this Court answer each of the certified questions presented for its review in the negative.

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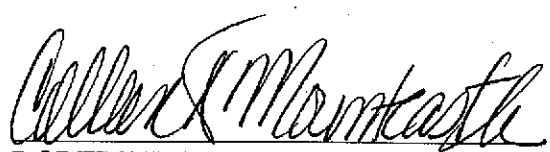

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